

TRANSFER OF TITLE: SECTIONS 21 TO 26 OF THE SALE OF GOODS ACT 1979

A Consultation Document

1 Introduction

1.1 The UK legislation governing the sale of goods is essentially the product of the common law as it developed over many centuries. This common law was codified in the Sale of Goods Act 1893. This Act was in turn consolidated, but not significantly amended, in the Sale of Goods Act 1979 (hereafter SGA). The provisions relating to transfer of title are contained in sections 21-26. To a limited extent the common law of transfer of title has been modified by statute: relevant statutes are the Bills of Sale Acts 1878 and 1882, the Factors Act 1889, the Hire-Purchase Act 1964 (hereafter HPA) and Consumer Credit Act 1974.

1.2 The basic rule governing the law of transfer of title is expressed in the maxim "*nemo dat quod non habet*" (no one can give what he does not have). In other words, if a person does not have good title to goods then he cannot pass good title to them to another, and a purchaser of goods to which the seller has no title cannot himself acquire it. The law is thus designed to protect the owner of goods rather than a purchaser of goods to which the seller's title may be flawed, albeit the purchaser may have acted in good faith.

1.3 But the rule of *nemo dat* is not absolute. The existence of exceptions to the rule reflects a balancing of two competing interests. This can be illustrated in words, which still hold good today, of Lord Denning in a judgment given in 1949:

"In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a better title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our times."



1.4 The following exceptions to the rule of *nemo dat* grew up under the common law:

- (i) estoppel, where the owner by his conduct is precluded from denying the seller's authority to sell (section 21(1) SGA)
- (ii) sales in market overt (section 22 SGA). The rule of market overt emerged in the middle ages (the principle was well established by the fourteenth century) and provided in effect that if a purchaser bought goods according to the usage of a market then he acquired good title. The thinking behind this was that when markets were the normal means of buying and selling goods, and neither goods nor people were generally mobile, an owner who had been deprived of possession of goods could expect to find them if he searched the relevant stalls in the local market. It was his responsibility to do so, and if he failed then an innocent purchaser of the goods could acquire good title. The law applies only to public markets and its practical effect is largely, though not entirely, confined to the City of London by virtue of the City's having acquired the status of a permanent market in medieval times
- (iii) sales where the seller of the goods has a voidable title to them, but the title has not been voided at the time of sale (section 23 SGA). An example would be a case where a seller has himself acquired goods by misrepresentation and then sells them to a purchaser. Because the goods were acquired by misrepresentation the seller's title to them was voidable, but the purchaser acquires good title if he buys before misrepresentation has been detected and the original contract avoided. It should be noted that the purchaser does not acquire good title if the contract were void from the beginning (ie as a result of a fundamental mistake regarding the circumstances of the contract). Whether a given contract is void or voidable will depend on the facts of the case
- (iv) sales where the seller having sold the goods continues in possession of those goods (or the documents of title to them) and then sells them to somebody else who buys in good faith (section 24 SGA)
- (v) sales where a seller buys, or agrees to buy goods in which the owner nevertheless retains certain rights, obtains possession of them (or of the documents of title to them), and then sells them to a purchaser (section 25(1) SGA). That purchaser, provided he buys in good faith without awareness of the owner's rights, acquires good title. It should be noted that this qualification to the rule of *nemo dat* was held not to apply to hire purchase and conditional sale agreements under which the owner retains title until the conditions of the agreement had been fulfilled (both hire purchase and conditional sale agreements are now defined in statute: see the Hire Purchase Act 1964 and Consumer Credit Act 1974).

1.5 These essentially common law provisions have been modified by statute as follows:

- (i) under the Bills of Sale Acts 1878 and 1882 a purchaser of goods covered by a bill of sale which has been properly registered does not acquire good title
- (ii) section 2 of the Factors Act 1889 provides that good title passes to the purchaser where goods are sold by a mercantile agent where he is in possession of goods with the owner's consent and sells them in the ordinary course of business. Sections 8 and 9 of the Factors Act also effectively duplicate sections 24 and 25 SGA
- (iii) Part 3 of the Hire Purchase Act 1964 (HPA) provides that a purchaser (not being a trade or finance purchaser) who purchases in good faith a car subject to a hire purchase or conditional sale agreement nevertheless obtains good title.

2 Previous considerations of transfer of title

2.1 The issue of transfer of title was considered by the Law Reform Committee in a report published in April 1966 (Cmnd 2958). The Committee made a number of recommendations aimed primarily at simplifying the case law that had grown up since enactment of the 1893 Act, generally in favour of the innocent purchaser. The Committee also recommended reversal of the decision in *Rowland v Divall* (see below) in which it had been held that if a purchaser bought goods to which the seller had no title then there was a total failure of consideration and the purchaser could recover the full cost of his purchase from the seller irrespective of any beneficial enjoyment he may have had of the goods in question. More controversially, the Committee recommended that a person who bought goods by normal retail sale or at a public auction should acquire good title to those goods regardless of whether the seller himself had good title (one member of the Committee, Lord Donovan, dissented from this latter recommendation). In the event no action was taken on the recommendations of the Law Reform Committee.

2.2 The issue was also considered by Professor A L Diamond in his review of security interests in property (HMSO 1989). He considered that the protection of the innocent purchaser was inadequate under existing law, and that there should instead be a general principle that where the owner of goods has entrusted them to, or acquiesced in their possession by, another person, then if that person disposed of the goods to an innocent purchaser in the ordinary course of business the innocent purchaser would obtain good title.

3 Position in other jurisdictions

3.1 Many other common law countries followed the example of the UK and codified the law concerning sale of goods, often using the Sale of Goods Act 1893 as a model. In Ireland the provisions of the 1893 Act in this area, including some since repealed in the UK, remain in force. In Australia the exceptions to the *nemo dat* rule remain very similar to those in the 1893 Act, though in South Australia they have been augmented in favour of a third party (other than a person who trades in goods of the type in question) who in good faith and for valuable consideration purports to acquire title to goods subject to a "consumer lease" or "consumer mortgage" without actual notice of the interest of the lessor or mortgagee.

3.2 The USA's Uniform Sales Act was also similar to the 1893 Act but has been superseded by the Uniform Commercial Code. The UCC moves the determining feature of which claim should dominate away from being the intent of the original owner to being the good faith of the ultimate purchaser. A guiding principle in the UCC is the determination of the competing priorities of two innocent parties, for example, the original owner who parts with goods through the fraudulent conduct of another and an innocent third party who gives value for the goods to the perpetrator of the fraud without knowledge of the fraud. In favouring the innocent purchaser the UCC endeavours to promote the flow of commerce by placing the burden of ascertaining and preventing fraudulent transactions on the one in the best position to prevent them: the original seller. The UCC does not however permit title to pass where the seller has no title, such as when goods are acquired from a thief, even if the transaction takes place in good faith.

3.3 The concept of transfer in good faith is more familiar in civil law systems. Under German law a person relying in good faith upon the assumption that a person in possession of a thing is its owner, acquires ownership, provided the transferor has not acquired possession against the will of the true owner. Ownership is thus not acquired if the thing has been stolen from the owner or been lost or in any other way become missing, though there is an exception to this rule when goods are transferred by way of public auction.

3.4 Under the French Civil Code the general principle is that the sale of a thing belonging to another is void. But if the original owner parted voluntarily with the possession of the goods sold (for example, by way of hire or deposit) the person who subsequently buys those goods from the non-owner and acquires possession in good faith acquires ownership. Even where the goods were stolen from, or lost by, the original owner, their purchase in a fair or market, or at a public auction, or from a merchant dealing in such goods, allows the purchaser to retain them until repaid their price by the original owner.

4 Proposals for reform

When the Law Reform Committee was invited to consider the law regarding transfer of title it was on the basis that they should consider whether the rule of *nemo dat* should be modified "in the interest of persons who are the victims of theft, fraud or mistake invalidating the transfer". Professor Diamond also considered that innocent purchasers of goods deserved better protection than the current law provided. This general issue aside, the law is complex and contains a number of anomalies. The Government has taken no particular stand in this debate, but seeks the views of consultees on whether reform is needed. If so, views are sought on three propositions put forward for discussion. They are not mutually exclusive.

- A **the law should be simplified, and protection for innocent purchasers extended, by replacing the present detailed provisions of SGA with a broad principle, as recommended by Diamond, that where the owner of goods has entrusted those goods to, or acquiesced in their possession by, another person, then an innocent purchaser of those goods should acquire good title**
- B **the rule of market overt should be abolished**
- C **the principle already embodied in Part 3 of HPA should be extended to all goods subject to a hire purchase or conditional sale agreement, and also to goods held on lease or covered by a bill of sale.**

These propositions are discussed further in turn below.

5 Protection for innocent purchasers

5.1 The proposed principle would involve repeal of sections 21, 23, 24 and 25 SGA, and of sections 2, 8 and 9 of the Factors Act 1889, and their replacement by a single broad provision. The principle would apply whether possession was given under a sale contract, a conditional sale contract, a hire purchase agreement or a leasing contract. It would also apply to the giving of possession under a purported contract notwithstanding that there was a mistake as to identity, and to sales where a voidable title had been voided without the knowledge of the possessor of the goods.

5.2 The principle would however need to be subjected to certain limits. It is suggested first, that it be limited to goods which are disposed of in the ordinary course of business, or at least in circumstances which appear to a reasonable purchaser to be in the ordinary course of business. It would not, for example, cover goods loaned by one private individual to another and then sold by the latter without the knowledge or agreement of the former. It seems doubtful whether the principle should extend to goods on loan or short term hire, and if these are to be excluded then it would be necessary to define where the boundaries should be drawn. It would be necessary to consider, for example, the position of goods sent on approval and goods entrusted to someone acting by

way of business for a particular and temporary purpose (for example sending a car to be serviced).

5.3 It may nevertheless be for consideration whether to go slightly further than sales in the course of business and extend the principle to all cases of sale by the possessor of consumer goods, or goods that reasonably appear to the purchaser to be consumer goods, whether or not the sale to the purchaser is or appears to be in the ordinary course of business. In that event consumer goods would need to be defined.

5.4 The general principle would cover the situation where a debtor in possession of goods subject to a security interest sells them in the ordinary course of business or appears to do so. It is suggested that it should also extend to goods covered by a security interest where the purchaser is unaware that the sale is a breach of the terms of that security interest (but see also the discussion below of goods subject to a hire purchase or conditional sale agreement).

6 The rule of market overt

6.1 Market overt is a medieval survival. The original justification for it, that stolen goods could be expected to turn up in the local market because there was no other practical means for the thief to dispose of them, has long since disappeared. The rule as it at present stands produces absurd anomalies. The only question is whether market overt should be abolished, or whether the principle should be extended to all sales from retail premises. The majority of the Law Reform Committee recommended extension of the principle on the grounds that this would give protection to the innocent purchaser and would facilitate commercial transactions. The Committee drew attention to the fact that the owner would have a right of action for conversion against the retailer, and was likely anyway to be covered by insurance. Lord Donovan, in a dissenting opinion, argued that a purchaser in this sort of situation was often far from innocent, that his lack of good faith would be very difficult to prove, that the right of action against the retailer was unlikely to be of much value in practice, and that so major a modification to the rule of *nemo dat* was likely to facilitate the disposal of stolen goods.

6.2 It is suggested that, despite the disadvantage that the genuinely innocent purchaser would be left with little or no redress, the balance of argument is in favour of abolishing the rule of market overt rather than extending it.

6.3 Abolition of the rule of market overt would tilt the scales further against the innocent purchaser, and would move UK law away from rather than towards that of our major EC partners. Its extension to all retail sales, on the other hand, could be regarded as creating an injustice to the original owner and also as an encouragement to crime. Indeed, the main criticism of the existing rule of market overt is its potential role in the disposal of stolen goods. Opinions on this aspect would be welcome.

7 The special problem of goods subject to a hire purchase or conditional sale agreement

7.1 If the first of the three propositions put forward in paragraph 8 above is accepted then the position of goods which are the subject of a hire purchase or conditional sale agreement will be largely subsumed in the general principle. If however this proposition is rejected or modified then it will become necessary to consider what, if any, special arrangements should be made in this area.

7.2 A hire purchase agreement is not an agreement to sell. The basic premise of hire purchase is that the agreement between the owner of the goods and the would be purchaser provides that title in the goods may transfer to the purchaser on completion of a particular part of the transaction, usually the making of a final payment which includes a notional sum for effecting the sale of the goods. It should be distinguished from a conditional sale agreement (which is likewise not treated as an agreement to sell: SGA Section 25 (2)) which usually provides that the title in the goods will pass to the purchaser on completion of payments as provided for in the agreement.

7.3 Protection for the innocent purchaser of a motor vehicle which is the subject of a hire purchase or conditional sale agreement is provided via Part 3 HPA (as amended by the Consumer Credit Act 1974). This protection is however subject to strict limits:

- (i) it extends only to persons not acting by way of business
- (ii) it extends only to motor vehicles
- (iii) it extends only to motor vehicles subject to a hire purchase or conditional sale agreement

7.4 An important factor in consideration of this question is the establishment of Hire Purchase Information PLC, which maintains a register of motor vehicles (and some other goods) subject to a financial interest. The HPI database is now open, for a fee, to both trade and private customers. However, registration of an interest with HPI is voluntary. Failure to register does not invalidate a claim to good title, and undertaking a search does not establish a claim to good title.

7.5 The present law is therefore anomalous. It provides protection for innocent purchasers of motor vehicles, but not of (for example) caravans or boats. It provides protection where a vehicle is covered by a hire purchase or conditional sale agreement, but not by a lease or bill of sale. It provides protection for the private but not for the business purchaser.

7.6 There are a number of arguments for extending the protection provided by Part 3 HPA. For example, innocent purchasers may have difficulty reselling a motor vehicle subject to a hire purchase agreement (because the dealer would not inherit good title). The number of vehicles subject to lease or hire has increased significantly since HPA was enacted, and a number of innocent purchasers of vehicles subject to leasing agreement or bills of sale have had their vehicles repossessed and found themselves left without effective redress. There seems no good reason why, if the principle of protection for the

innocent purchaser is accepted, this protection should be confined to motor vehicles. Despite the existence of HPI, it is not self-evident that protection should be denied to innocent purchasers simply because they happen to be acting by way of business.

7.7 Arguments against extending protection include the existence of HPI and the danger that extending protection might encourage those who do not have good title, and who should not be selling goods which are not theirs to sell, to indulge in such activity more readily. Finance houses already have to bear a substantial burden of risk, and it is often of little practical help to them that they have a claim against the person who has improperly sold their goods.

8 Other considerations

8.1 Rowland v Dival

In this case ([1923] 2 K.B. 500) it was held that if a purchaser bought goods to which the seller had no title then there was a total failure of consideration and the purchaser could recover the full cost of his purchase from the seller irrespective of any beneficial enjoyment he may have had of the goods in question. The Law Reform Committee criticised the decision as ignoring the fact that the purchaser might have enjoyed possession of the goods for some time, and recommended that the purchaser's rights should be limited to recovery of his actual loss, giving credit for any benefit he might have had from the goods whilst in his possession. It is for consideration whether this recommendation should be implemented.

8.2 Moorgate Mercantile Co Ltd v Twitchings

In this case ([1977] A.C. 890) a purchaser of a car subject to a hire purchase agreement argued that he should have good title because the seller had failed to register the agreement with HPI. It was held, though only by a majority, that this did not amount to estoppel by negligence and that the purchaser (who was not protected by HPA) did not get good title. If the general principle put forward in **Proposition C** above is not accepted, it is for consideration whether this decision should be reversed.

8.3 Proof of good faith on the part of the buyer

There is an anomaly in that whilst in the case of transactions covered by section 2 of the Factors Act 1889 (sale by a mercantile agent in the normal course of business) it is for the purchaser to show good faith, in the case of sales covered by section 25 SGA (sale of goods with a voidable title) it is for the original owner to prove that the purchaser did not act in good faith. This it will normally be difficult for the owner to do. If the general principle put forward in **Proposition A** is not accepted it is for consideration whether section 23 SGA should be brought in line with section 2 of the Factors Act.

9 Compliance Cost

In considering proposals for new legislation, the Government places great importance on giving due weight to the perception of business of the likely impact of the proposal on business. To measure this impact, a Compliance Cost Assessment (CCA) will be prepared and made available to business on request. Therefore, in addition to any comments on the draft regulations, it would be particularly helpful if consultees could identify and quantify any additional direct or indirect costs (recurring or non-recurring) that would be likely to arise for their business or business sector. So that these figures are meaningful please include an estimate of the annual turnover of that part of the business to which they relate: a one-off cost of £10,000 for legal expenses is a more significant burden on a company with a £250,000 turnover than one with a £250m turnover.

10 Acknowledgment

This consultation document draws in a number of places on the ideas proposed by Professor Diamond in his Review of Security Interests in Property, and his work is gratefully acknowledged.

Comments are requested in writing by 22 April 1994. They should be sent to:

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